NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

WILFRED EDWARDS,	)	
	)	**D.C. CRIM. APP. NO. 2002/078**
Appellant,	)	
	)	Re: T.C. Crim. No. 17/2002
v.	)	
	)	
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Appellee.	)	
	)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: September 17, 2004
Filed: November 30, 2004

BEFORE : **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **IVE A. SWAN**, Judge of the Territorial Court, Sitting by Designation.

Attorneys:

Harold R. Washington, TPD
Attorney for Appellant

Maureen Phelan, AAG
Attorney for Appellee.

MEMORANDUM OPINION

PER CURIAM.

The issue presented here, as framed by the appellant, is "Whether the police officer tailored his affidavit and testimony to violate Appellant's constitutional rights." Though not specifically designated as such, the appellant appears to be

challenging the court's denial of his motion to suppress that evidence.[1] For the reasons stated below, the trial court's denial of the suppression motion will be affirmed.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant Wilfred Edwards ["Edwards"] was arrested and charged with two counts of possession of a controlled substance with intent to distribute. Police say Edwards was arrested after they recovered a bag containing crack cocaine and marijuana which Edwards discarded as officers entered the area in which he was standing. According to the police version of events, officers were on routine patrol on Friedensthal Street, Christiansted, which they regard as a high intensity drug trafficking area. (Supplemental Appendix ["Supp. App."]at 7). As they patrolled the area, they saw a group of individuals standing in the street, and Edwards standing by himself in the nearby knee-high brush. (Supp. App. at 8, 13). Police say Edwards walked out of the brush area as he saw the police vehicle, removing a small packet from his pocket and discarding it behind him as he walked. (*Id*. at 9-11). At the suppression hearing, one of the officers, Police Officer Cecil Gumbs ["Officer Gumbs"] testified that at all times he had a clear and unobstructed view of Edwards, who was

[1] The only trial record submitted is a transcript of a hearing on the motion to suppress evidence.

approximately six feet away from the group gathered in the street. (*Id*. at 12, 34-35). Officer Gumbs testified he also had a clear view of the paper bag as it was discarded and immediately went to retrieve it. (*Id*.). In it, he found two plastic bags with what was determined to be two dime bags of marijuana and 39 pieces of crack cocaine. (*Id*. at 12-14). Officer Gumbs additionally testified that at no time did any of the other people present have possession of the brown paper bag. (*Id*. at 15).

Edwards disputes those facts, denying ownership of the drugs and asserting police fabricated the circumstances underlying his arrest. (Br. of Appellant at 4). In support of this assertion, Edwards contends that the fact that it was dark and that there were other persons present on the street belies Officer Gumb's assertion that he had a clear view of Edwards when he discarded the paper bag containing drugs. (*Id*.). He alleges police fabricated the circumstances of the arrest and tailored the affidavit supporting the arrest to satisfy constitutional requirements. (*Id*. at 9-11). Appellant filed a motion to suppress evidence of the drugs, which was denied below. Following a jury trial, appellant was sentenced to seven and one-half years imprisonment, five of which were suspended.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction to consider the judgments and orders of the Territorial Court in criminal cases. 4 V.I.C. § 33; Section 23A of the Revised Organic Act of 1954.[2] We review the Territorial Court's denial of the motion to suppress for clear error regarding the facts, and exercise plenary review over legal issues. *See Government of the V.I. v. Petersen*, 131 F.Supp.2d 707, 710 (D.V.I. App. Div. 2001); *HOVIC v. Richardson,* 894 F.Supp. 211, 32 V.I. 336 (D.V.I. App. 1995).

B. Denial of Motion to Suppress

While not framed as such, Edwards' primary argument is that the trial court erred in denying his motion to suppress drug evidence which served as the basis for his conviction, and in crediting the police officer's version of events. In that regard, the appellant challenges the officer's version of the facts as incredible. Embedded in Edwards' argument is also the additional argument that the standards for warrantless searches of abandoned property were not met in this instance, where the officer's purported observations were made at night under limited lighting and were, therefore, not believable. (See Appellant's

[2] *See* Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645, *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2003)(preceding V.I. CODE ANN. tit. 1).

Br. at 9-10).

1. Seizure Proper Under Exception to Warrant Requirement.

Appellant offers much discussion regarding whether he was subjected to an appropriate stop. However, the facts do not support a finding that there was a stop or seizure of Edwards prior to the police officer's recovery of the abandoned property. Therefore, Edwards' arrest was proper and not violative of the constitutional protections against unreasonable searches and seizures.

The protection against unreasonable searches and seizures is well-settled in our constitutional jurisprudence. *See* U.S. CONST. amend. IV (made applicable in the Virgin Islands by § 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561; *Katz v. United States*, 389 U.S. 347, 357(1967)(outlining exceptions to warrant requirement). These protections extend only to areas where an individual has an expectation of privacy. Thus, to effect a search or seizure of an individual or his property, a warrant is generally required, except under limited circumstances. Relevant here is the exception permitting warrantless searches of property deemed to have been abandoned. *See e.g.*, *Abel v. United States,* 362 U.S. 217, 240-41(1960). The rationale undergirding the abandonment doctrine is that one who abandons property no longer

holds any reasonable expectation of privacy warranting Fourth Amendment protections. *See United States v. Sinkler*, 91 Fed.Appx. 226,232, 2004 WL 539973,*4 (3rd Cir. 2004); (upholding the seizure of drugs that were tossed away by a defendant as he ran from police); *California v. Hodari D.,* 499 U.S. 621, 623-29(1991). Whether property is "abandoned" for Fourth Amendment purposes is a factual question based on the objective intent of its owner to voluntarily "relinquish possession and control of the object in question." *Sinkler*, 91 Fed.Appx. at 31(defining "abandoned property" as "property over which the owner has given up dominion and control with no intention of recovering it"). Key to this determination is voluntariness; therefore, property may be seized as abandoned only if it is found that the appellant was not seized at the time he discarded the drugs and that such abandonment was voluntary. *See Hodari D.,* 499 U.S. at 623; *Olinsky v. Government of V.I.,* 2004 WL 727363, *1 (D.V.I. App. Div. 2004). A person is "seized" within the meaning of the Fourth Amendment where there has been an application of physical force or a show of police authority to which he submits and where, given the circumstances, a reasonable person would have believed he was not free to leave. *See Hodari D.*, 499 U.S. at 626 (noting there is no seizure unless defendant actually submits to police authority).

Here, there were no facts to suggest a coercive police atmosphere or to support a finding that Edwards was seized at the time he discarded the drugs. Two uniformed police officers entered the area on routine patrol. Observing Edwards' apparently nervous reaction to their presence, one officer exited the police vehicle and started walking toward Edwards. Edwards immediately discarded the bag containing the drugs. From the testimony at the suppression hearing, there was no verbal exchange with police prior to Edwards' abandonment of the drugs, although there was some testimony that the officer might have *intended* to ask Edwards what he was doing in the brush. (Supp. App. at 31-33). These facts, without more, do not present a coercive atmosphere which would defeat the voluntariness of Edwards' action in discarding the bag containing drugs. *See e.g.,Commonwealth v. Pizarro*, 723 A.2d 675, 679-80 (Pa. Super. 1998)("A police cruiser passing through the neighborhood on routine patrol does not amount to police coercion compelling the abandonment of contraband."); *Joseph v. Government of V.I.*, 2002 WL 31573173, *3 (D.V.I. App. Div. 2002) ("A seizure does not occur simply because a police officer approaches an individual and asks a few questions.")(citing *Florida v. Bostick,* 501 U.S. 429, 434 (1991); *Hodari,* 499 U.S. at 628 (1991)("[M]ere police questioning does not constitute a seizure."); *Florida v. Royer,* 460 U.S. 491, 497

(1983)("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place.")). Therefore, the officer's recovery of the drugs was not the result of a seizure but, rather, the result of Edwards' voluntary abandonment of those drugs. Admission of that evidence was, therefore, proper under the standards noted above.[3]

2. Allegations of Fabrication

The admissibility of that evidence is unaffected by appellant's attempts to call into question the officer's credibility.

Appellant asserts the challenged evidence should have been suppressed because the officer's version of the facts was incredible. The gravamen of the appellant's argument in that regard is that the police officer's affidavit and testimony presented at the suppression hearing were fabricated to satisfy constitutional standards. He presents a largely unsupported argument that, following the protections enunciated under the Fourth Amendment and the cases developed thereto, police officers

[3] The appellant's assertions that Officer Gumbs' testimony did not establish a nexus between him and the abandoned drugs, where he denied any interest in the property, and the officer's failure to attest that he kept the bag under his direct view during the entire incident are also rejected, as they are not borne out by the record.

generally now routinely fabricate testimony about defendants dropping narcotics on the ground to justify otherwise unreasonable searches under the abandonment doctrine and that the arresting officer in this case similarly tailored his testimony to mimic constitutional standards for admissibility of evidence obtained in such seizures. Edwards further contends that, given the time of day and lighting conditions at the time of the arrest, Officer Gumbs' testimony that he saw Edwards remove the drugs from his right front pocket and then discard it defies credulity and presents a strong inference that the officer's version of the facts was fabricated.

Officer Gumbs' personal observation presents a question of credibility to be determined by the factfinder. *See Georges v. Government of the V.I.,* 119 F.Supp.2d 514, 523 (D.V.I. App. Div. 2000); *see also United States v. Delerme,* 457 F.2d 156, 160 (3d Cir. 1972). We are constrained to defer to the factfinder's determinations in that regard, unless the testimony is "inherently incredible." *See Petillo v. New Jersey,* 562 F.2d 903, 907 (3d Cir. 1977); *see also* 29A AM JUR *Evidence* § 1447. Testimony is deemed inherently incredible or improbable where it is "either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should

not differ." 29A AM JUR § 1447; *see also Hollis v. Scott*,516 So.2d 576,578-79 (D.Ala. 1987)("The mere fact that testimony given by a witness in support of an issue is not plausible does not destroy its probative force. Where, however, the testimony of a witness is incredible, inherently or physically impossible and unbelievable, inherently improbable and irreconcilable with, or contrary to physical facts and common observation and experience, where it is so opposed to all reasonable probabilities as to be manifestly false, or is contrary to the laws of nature or to well-known scientific principles . . . , it is to be disregarded as being without evidentiary value even though uncontradicted.") (citation omitted).

There is nothing inherently incredible about Officer Gumbs' assertion that he was able to clearly see the appellant as he discarded the bag containing drugs. Apart from the fact that it was approximately 7:45 p.m. on the night in question, there was little information submitted, at least on this record, regarding the lighting conditions in the area. Nonetheless, the facts here and Officer Gumbs' testimony regarding his ability to observe simply do not rise to the level of incredulity that would warrant disturbing the trial court's credibility determination. Moreover, trial counsel had the opportunity to cross examine Officer Gumbs at the suppression hearing and to call into

question his credibility and his personal observations; indeed, that constituted a large part of the cross examination.[4] Accordingly, there being no basis for departing from the well-settled view that credibility determinations are not the province of reviewing courts and are reserved for the factfinder, the trial court's determinations in that regard will be left undisturbed.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of the appellant's motion to suppress.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk
NOT FOR PUBLICATION

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[4] Appellant also argues Officer Gumbs' asserted ability to observe his actions and the small packet of drugs was incredible, given the officer's admission that he was "ten to twenty yards" away from the defendant and his belief that there were "twelve feet" in a yard. As noted above, this presents a credibility determination for the court as factfinder. It is clear from the record, however, that the distance given by the officer was in reference to the proximity of a nearby house at the cemetery entrance to where Edwards stood. (Supp. App. at 24-26). This was in response to a specific question by defense counsel. Officer Gumbs' attempt to approximate distance was clearly not a reference to the distance between the officer and the appellant at the time of the initial sighting. (*Id.*). In fact, the officer specifically stated, after viewing a photo of the nearby house, that the arrest occurred "a few yards" from the area appearing in the photo, though he could give no definite distance. (*Id*. at 24).

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Attorneys:

Harold R. Washington, TPD
Attorney for Appellant

Maureen Phelan, AAG
Attorney for Appellee.

JUDGMENT OF THE COURT

PER CURIAM.

AND NOW, for the reasons more fully stated in a Memorandum Opinion of even date, it is hereby

ORDERED that the trial court's denial of the appellant's Motion to Suppress is **AFFIRMED**.

SO ORDERED this 30th day of November, 2004.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk